APPENDIX A

Docket No. 75598 - Agenda 7 - September 1994.

THE PEOPLE OF THE STATE OF ILLINOIS,
Appellant v. JOEL OLIVERA, Appellee.

JUSTICE HARRISON delivered the opinion of the court:

In the circuit court of Cook County a jury convicted the defendant, Joel Olivera, of the first degree murder of Raphael Torres, for which a sentence of 35 years was imposed. Upon review the appellate court concluded not only that the trial court had erred by denying the defendant's motion to suppress his inculpatory statements but also that without these statements the evidence was insufficient to prove him guilty beyond a reasonable doubt. As a consequence the appellate court reversed the defendant's conviction without remanding the cause for retrial. We granted the State leave to appeal (145 Ill. 2d R. 315).

The issue presented concerning the defendant's motion to suppress is the relatively narrow one of whether, after having invoked his right to the presence of counsel during custodial interrogation, the defendant waived that right by initiating a conversation with the police in a manner evincing a willingness and a desire for a generalized discussion about the investigation and by knowingly and intelligently choosing to speak with law enforcement authorities in the absence of counsel. At the hearing on the motion to suppress, testimony disclosed that the defendant, who was 16 years old when Raphael Torres was murdered on July 29, 1998, had been sought as a suspect in an unrelated offense, namely, the aggravated

battery or attempted murder of Rafino Cortez committed two days later on July 31 1988. In the company of both his father and his attorney, defendant came to the police station at about 6:45 p.m. on August 9, 1988, and met with Officer Darryl Gilliam concerning the shooting of Rafino Cortez. It is not disputed that Officer Gilliam advised defendant of his rights pursuant to *Miranda v. Arizona*, (1966), 384 U.S. 436, 16 L.Ed. 3d 694, 86 S.Ct. 1602, and that defendant indicated in the presence of his attorney and his father that he did not wish to speak with the officer beyond providing background information for the arrest report.

Shortly thereafter defense counsel left the police station. Later in the evening, not long before Officer Gilliam went off duty, the officer turned the defendant over to Detective Christon Kato, advising the detective, according to the officer's testimony, that the defendant had surrendered himself with his attorney, that the officer had arrested defendant, that the officer had advised defendant of his rights pursuant to *Miranda*, and that defendant's attorney had instructed defendant to make no statement and to give the officer no information about the shooting of Rafino Cortez. A short time later a lineup was conducted in which two witnesses identified the defendant with respect to the shooting of Rafino Cortez.

Detective Kato testified at the suppression hearing that at about 9 p.m. on August 9, 1988, he had been assigned to investigate the shooting of Rafino Cortez. When he learned later that the defendant was in custody, he arranged for a lineup, which was conducted, he said, at about 10:45 that evening. Detective Kato testified further that after he had removed the other persons from the room where the lineup had been conducted, the defen-

dant remained in the room "at which time he asked me what happened." Detective Kato responded, he said, by telling defendant that he had been "positively identified." Then, the detective testified, defendant "stated that he wanted to know what happened next. I told him I wanted to advise him of his rights, and I advised him of his rights at that time." After the defendant stated that he understood each right as the detective informed him of it, defendant said that he had not been alone when he shot Rafino Cortez.

Following a conversation of about 15 minutes' duration at which his partner, Detective Wayne Johnson, was also present, Detective Kato's lieutenant summoned Detective Kato to his office and apprised him of a gang-related shooting similar to that of Rafino Cortez that had occurred two days earlier in the same area and had involved a car of similar description. Prior to his conversation with the lieutenant, Detective Kato had no knowledge of the homicide. After reviewing the reports about it, Detective Kato returned to the room where defendant was being held, advised him of his rights, and inquired whether he had any knowledge of the shooting of Raphael Torres on July 29 1988. The defendant stated that he understood his rights, and a conversation of about 15 to 20 minutes' duration ensued during which the defendant made inculpatory remarks about the homicide. Later, at about 3:30 a.m., Detective Kato had another conversation with the defendant at which an Assistant State's Attorney and a youth officer were present and during which defendant made further inculpatory admissions with respect to the homicide. Still later, at 5:38 a.m., in the presence of these same three persons the defendant gave a court-reported inculpatory statement concerning the

homicide. Detective Kato testified that the defendant never asked to speak to his attorney and that at no time had he told the defendant he could not talk to his attorney.

Detective Johnson's account of the conversation with defendant following the lineup differed dramatically from that of Detective Kato in certain important respects addressed during cross-examination. On direct examination by the State, Detective Johnson testified that, together with Detective Kato, he had conducted a lineup concerning the shooting of Rafino Cortez in which the defendant had been identified and after which the defendant had given a statement of about 10 minutes' duration concerning the shooting of Rafino Cortez, which was the subject of the lineup. Thereafter the witness and Detective Kato spoke with Lieutenant Phalon, from whom they learned about the homicide two days earlier. Following their return to the interview room where the defendant was being held, Detective Kato advised the defendant of his rights pursuant to *Miranda*. After the defendant stated that he understood his rights, he was asked whether he would speak to the detectives and was informed of the investigation into the homicide. A 15-minute conversation with the defendant concerning the homicide took place. On cross-examination Detective Johnson expressed the belief that following the lineup Detective Kato, rather than defendant, had been the first to speak when Detective Kato informed defendant, at about 11 p.m., that he had been picked out during the lineup as an offender. In response the defendant stated to Detective Kato that he had not been alone. Not until around midnight, Detective Johnson testified, prior to the initial conversation with defendant concerning the homicide, did

Detective Kato advise defendant of his rights pursuant to *Miranda*.

Following the hearing on the defendant's motion to suppress, the circuit court expressed the belief that "what happened is as Officer Kato testified" and concluded that by asking "What happened?" the defendant had initiated an exchange with the detective and had thereby waived his rights after invoking them. The circuit court observed that thereafter the defendant had asked a second question, "What happens next?" that, in the words of the court, "flowed into the defendant['s] making some statements pertaining to the aggravated battery, that he was not alone when he shot the victim in [that] case." As a consequence of the defendant's waiver of his rights, the circuit court denied his motion to suppress.

If after being informed of the right to have counsel present, an accused states that he wants an attorney, interrogation must cease until an attorney is present, and at that time the accused must have an opportunity to confer with the attorney and to have the attorney present during any subsequent questioning. *Miranda v. Arizona*, (1966), 384 U.S. 436, 16 L.Ed. 3d 694, 723, 86 S.Ct. 1602, 1628.) An accused who has expressed the desire to deal with police only through counsel is not subject to further interrogation by authorities until counsel has been made available to him, unless the accused himself initiates further communications, exchanges, or conversations with the police. (*Edwards v. Arizona*, (1981), 451 U.S. 477, 484-85, 68 L.Ed. 2d 378, 386, 101 S.Ct. 1880, 1884-85.) Even if the accused initiates a conversation that takes place after he has expressed the desire to deal with the police only through counsel, where reinterrogation follows, the burden remains upon

the prosecution to show that subsequent events indicated a waiver of the fifth amendment right to have counsel present during the interrogation. (*Oregon v. Bradshaw*, (1983), 462 U.S. 1039, 1044, 77 L.Ed. 2d 405, 412, 103 S.Ct. 2830, 2834.) As this court observed in *People v. Hicks*, (1989), 462 Ill. 2d 488, 492, the Supreme Court defined in *Oregon v. Bradshaw*, (1983), 462 U.S. 1039, 77 L.Ed. 2d 405, 103 S.Ct. 2830, the approach courts should take when addressing the question whether a defendant has waived this right, once invoked. The court's preliminary inquiry is whether the defendant, rather than the police, initiated the conversation in a manner evincing a "willingness and a desire for a generalized discussion about the investigation." (*Bradshaw*, 462 U.S. at 1045-46, 77 L.Ed. 2d at 412, 103 S.Ct. at 2835; *Hicks*, 132 Ill. 2d at 493.) If the court determines that the accused initiated the conversation in a way evincing a willingness and a desire for a generalized discussion concerning the investigation, it must make one other inquiry in determining whether a defendant has waived his right to the presence of counsel and his right to remain silent during custodial interrogation: whether the accused, by his or her initiation of such a conversation, coupled with the totality of the other circumstances, knowingly and intelligently waived this right. *Bradshaw*, 462 U.S. at 1046, 77 L.Ed. 2d at 413, 103 S.Ct. at 2835; *Hicks*, 132 Ill. 2d at 493.

In the instant case the defendant's question "What happened?" posed to Detective Kato immediately following the conclusion of the lineup cannot be said to evince on the defendant's part a willingness and a desire for a generalized discussion concerning the investigation. To ascribe such significance to this limited question would render virtually any remark by a defendant, no matter

how offhand or superficial, susceptible of interpretation as an invitation to discuss his case in depth. To do so would amount to a perversion of the rule fashioned in *Edwards* and articulated more fully in *Bradshaw*.

We notice that when the defendant in *Bradshaw* asked, "Well, what is going to happen to me now?" the officer answered by saying, "You did not have to talk to me. You have requested an attorney and I don't want you talking to me unless you so desire because anything you say—because—since you have requested an attorney, you know, it has to be at your own free will." (*Bradshaw*, 462 U.S. at 1042, 77 L.Ed. 2d at 410, 103 S.Ct. at 2833.) Here, by contrast, Detective Kato did not respond with any such warnings but, instead, answered the defendant's question. Although the detective did not interrogate defendant further at this juncture, the detective's response was one that would and did elicit further comment by the defendant and culminated in the incriminating statements defendant sought ultimately to suppress.

The safeguards of *Miranda* come into play whenever a person in custody is subjected not only to express questioning but also to its functional equivalent. (*Rhode Island v. Innis*, (1980), 466 U.S. 291, 300-01, 64 L.Ed. 2d 297, 307-08, 100 S.Ct. 1682, 1689.) The term "interrogation" under *Miranda* refers both to express questioning and to any words or actions on the part of the police, other than those normally accompanying arrest and custody, that the police should know are reasonably likely to elicit an incriminating response from the suspect. (*Innis*, 466 U.S. at 301, 64 L.Ed. 2d at 308, 100 S.Ct. at 1689-90.) In determining whether a statement is one reasonably likely to elicit such a response, the focus is primarily upon the perceptions of the suspect rather than

upon the intent of the police. (*Innis*, 466 U.S. at 301, 64 L.Ed. 2d at 308, 100 S.Ct. at 1689-90.) The answer of Detective Kato was one that the detective should have known would be reasonably likely to elicit an incriminating response from the defendant. If a question by an accused who has invoked his right to the presence of counsel during custodial investigation is to be deemed an initiation of a conversation in a manner evincing a willingness and a desire for a generalized discussion concerning the investigation, the proper response of the police to such a question must be to advise the accused of his rights, as was done by the officer in *Bradshaw*, and not to provide answer, in the absence of such warnings, that police should know is reasonably likely to elicit an incriminating response.

Inasmuch as we hold that the defendant did not initiate the conversation in a manner evincing a willingness and desire for a generalized discussion concerning the investigation, we need not make the further inquiry required by *Bradshaw* to be made after a court has determined that an accused has initiated such a conversation. Therefore, we affirm the judgment of the appellate court insofar as it reverses the circuit court's denial of the defendant's motion to suppress his inculpatory statements.

We turn now to the State's contention that the appellate court, having found error in the circuit court's denial of the defendant's motion to suppress, committed a further error by reversing the judgment of defendant's conviction without remanding the cause for a new trial. After observing that the State presented no physical evidence linking defendant to the crime and no witnesses who could identify him, the appellate court found that

without defendant's statements the State presented no evidence linking him to the shooting of Raphael Torres and reversed his conviction for first degree murder.

The double jeopardy clause forbids a second, or successive, trial for the purpose of affording the prosecution another opportunity to supply evidence it failed to muster in the first proceedings. (*Burks v. United States*, (1987) 437 U.S. 1, 11, 57 L.Ed. 2d 1, 9, 98 S.Ct. 2141, 2147.) As this court acknowledged in *People v. Mink* (1990), 141 Ill.2d 163, 173, for purposes of double jeopardy the United States Supreme Court has distinguished between judgments reversing convictions on account of trial error and judgments reversing convictions on account of evidentiary insufficiency. Reversal for trial error is a determination that the defendant has been convicted by means of a judicial process defective in some fundamental respect, whereas reversal for evidentiary insufficiency occurs when the prosecution has failed to prove its case, and the only proper remedy is a judgment of acquittal. *Mink*, 141 Ill.2d at 173. Although the double jeopardy clause precludes the State from retrying a defendant after a reviewing court has determined that the evidence introduced at trial was legally insufficient to convict, the double jeopardy clause does not preclude retrial of a defendant whose conviction has been set aside because of an error in the proceedings leading to the conviction. *Mink*, 141 Ill.2d at 173-74. Moreover, retrial is permitted even though evidence is insufficient to sustain a verdict once erroneously admitted evidence has been discounted, and for purposes of double jeopardy all evidence submitted at the original trial may be considered when determining the sufficiency of the evidence. *Lockhart v. Nelson* (1988), 488 U.S. 33, 40, 102

L.Ed. 2d 265, 273, 109 S.Ct. 285; *People v. Avery*, (1989), 180 Ill.App.3d 146, 157.

Here the appellate court determined that the evidence against the defendant was insufficient to sustain a verdict after it discounted the evidence admitted as a result of the circuit court's error in denying the defendant's motion to suppress his inculpatory statements. Because the defendant's conviction was set aside on account of a trial error, the appellate court erred in failing to consider all of the evidence submitted at the original trial when it resolved the question of the sufficiency of the evidence. However, for purposes of judicial economy, rather then remand this cause of action to the appellate court for reconsideration of this question, we address it ourselves. See, *People v. Taylor*, (1979), 76 Ill.2d 289, 309.

Although the defendant maintains that the evidence adduced by the State at trial was legally insufficient to convict him even when his inculpatory statements are included in an assessment of the sufficiency of the evidence, we must disagree. The defendant advances this position principally because the physical evidence presented by the State is at odds in some respects with the defendant's description of his commission of the offense. In his signed court-reported statement to police defendant said that on July 29, 1998, at about 10:30 p.m. he was riding with White Boy in the passenger seat of White Boy's car, after having met him in front of defendant's house. While riding with White Boy, he saw seven members of a gang, namely, the Bishops, who, he stated, "started representing on us and throwing bottles." The defendant stated further that he is a member of a street gang called the Morgan Boys, whose members did not get along with members of the Bishops, that White Boy gave

him a gun from under the driver's seat, and that defendant started shooting "[a]t the crowd," firing "[t]wo to seven times."

By contrast, Alvaro Dominguez testified at trial that on the night in question he was with a friend who lived near the intersection in Chicago where the shooting occurred when he and his friend saw a youth crossing the intersection alone. As the youth did so, he said, a car, which had stopped at the stop sign at the intersection, slowly entered the intersection. The witness testified that he heard "something said" by someone in the car or by the youth "[a]nd then after something was said, a shot was fired." After the witness heard the single shot, which occurred when the car was approximately in the middle of the intersection, he "saw the youth stumble onto the sidewalk and out of view and the car take off northbound." Although the witness was unsure of the number of persons in the car, he thought that there were two, the driver and a person seated in the passenger seat behind the driver. The witness said that there could have been someone in the front passenger's seat but that he was uncertain about this detail. Shortly after the witness heard the shot fired, he saw the victim on the driver's side of the car. Although it is not clear from the record on review exactly how far from the intersection the witness was when he saw and heard these things, he testified on redirect examination that from his point of view "down the block" he saw silhouettes of people in the car but would be unable to identify anyone in it.

An evidence technician testified that there was only one street light at this intersection at the time, describing it as the "old type" no longer common in Chicago, not "that bright sodium light like we have now." One dis-

charged cartridge case was found lying in the intersection. During the course of their investigation police found only one shell casing. The forensic pathologist who had performed an autopsy on the body of the victim testified that there was a gunshot entry wound on the right upper chest and that the victim had died of that gunshot wound.

The defendant, who did not testify at trial, presented an alibi defense through the testimony of two neighbors who said that they had each been sitting outside during the evening in question and had observed the defendant outside as well.

The relevant question to ask in reviewing the sufficiency of the evidence to support a criminal conviction is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Young*, (1989), 128 Ill. 2d 1, 49. During closing argument the State proposed that although defendant admitted participation in the offense in his statement to police, he was not entirely honest in the account he gave, preferring instead to interject into his account self-serving, albeit false, details suggesting that he had acted out of fear in taking the life of another. Particularly since nothing about the evidence adduced demonstrates that the defendant was aware of the presence of an eyewitness to the shooting of Raphael Torres and, in fact, the eyewitness who testified was standing some distance from the intersection where the shooting occurred at night in an area not brightly illuminated, the discrepancies in defendant's court-reported account may stem, in part, as the State argued in rebuttal during closing argument, from the defendant's mistaken belief that he had committed the offense unob-

served. Whatever inferences the jury actually drew from the evidence, a review of the record in the light most favorable to the prosecution makes abundantly clear that a rational trier of fact could have found the essential elements of first degree murder beyond a reasonable doubt. Therefore, the cause should have been remanded to the circuit court for retrial, and the appellate court erred by reversing the judgment of the circuit court without doing so.

For the reasons stated, we affirm the judgment of the appellate court insofar as it reverses the judgment of the circuit court in denying the defendant's motion to suppress his inculpatory statements, but we reverse the judgment of the appellate court insofar as it reverses the judgment of the circuit court for insufficient evidence, and we remand the cause to the circuit court for retrial.

Appellate court affirmed in part
and reversed in part;
circuit court reversed;
cause remanded.

CHIEF JUSTICE BILANDIC, concurring in part and dissenting in part:

I agree with the majority's conclusion that the evidence presented at the defendant's trial, when viewed in the light most favorable to the prosecution, was sufficient to support the defendant's murder conviction. I do not agree, however, with the majority's conclusion that the police initiated a conversation with the defendant after he invoked his right to counsel in violation of the rule established in *Edwards v. Arizona*. I would find, instead,

that the defendant, after invoking his right to counsel, initiated a conversation with the police evincing a willingness and desire for a generalized discussion about the investigation.

The Supreme Court, in *Edwards v. Arizona*, (1981), 451 U.S. 477, 68 L. Ed. 2d 378, 101 S. Ct. 1880, articulated the general rule that once a defendant invokes his right to have counsel present during interrogation, all questioning must cease until counsel is actually present, unless the accused himself initiates further communication, exchanges, or conversations with the police. In *Oregon v. Bradshaw*, (1983), 462 U.S. 1039, 77 L.Ed. 2d 405, 103 S. Ct. 2830, the court outlined the approach courts should follow in determining whether a defendant who invokes his right to counsel, but later initiates a conversation with the police, has actually waived his right to have counsel present during custodial interrogation. The preliminary inquiry is whether the defendant initiated the conversation in a manner evincing a willingness and a desire for a generalized discussion about the investigation. *Bradshaw*, 462 U.S. at 1045-46, 77 L.Ed. 2d at 412, 103 S.Ct. at 2835. The second inquiry is whether the totality of the circumstances, including the fact that the defendant initiated a conversation with the police, demonstrate that the defendant knowingly and intelligently waived his right to counsel's presence during questioning. *Bradshaw*, 462 U.S. at 1045-46, 77 L.Ed. 2d at 412-13, 103 S.Ct. at 2835.

The majority never addresses the second prong of the *Bradshaw* inquiry, because it finds that the police, rather than the defendant, initiated the conversation following the defendant's invocation of his right to counsel. In reaching this conclusion, the majority adds a new element to the *Bradshaw* two-part inquiry. The majority

stated that, when a defendant asks a question, the answer to which may elicit an incriminating response, the police must first remind the defendant of his right to have counsel present during questioning. The opinion cites no authority for this proposition. To the extent that the opinion relies upon *Bradshaw* as support for this rule, it is wrong. *Bradshaw* does not expressly or implicitly adopt such a requirement. In fact, the *Bradshaw* opinion discussed the police officer's response to the defendant's question only in the context of finding that the defendant's question could be, and was, understood as indicating the defendant's desire to engage in a generalized discussion of the investigation. Nothing in *Bradshaw* supports the majority's conclusion that the police must, in all cases, reissue *Miranda* warnings to a defendant who initiates further communication with the police after invoking his right to counsel.

Even assuming that the majority is correct in adopting such a requirement, it completely fails to acknowledge that the police here *did* remind the defendant of his right to have counsel present during questioning *before* the defendant made incriminating statements. Officer Kato testified at the suppression hearing that the defendant, after the lineup, asked, "What happened?" Officer Kato told the defendant that he had been positively identified. The defendant then stated that he wanted to know what would happen next. Officer Kato testified that he readvised the defendant of his *Miranda* rights and the defendant indicated that he understood those rights. Officer Kato testified that the defendant made incriminating statements only *after* he was reminded of his rights. Although Officer Kato's testimony differed, in some respects, from the testimony of another officer who participated in the investigation, the trial court, in denying the

defendant's motion to suppress, specifically stated, "I believed that what happened is as Officer Kato testified."

Thus, even if the majority's newly fashioned rule is applied to the facts of this case, it is apparent that the first part of the two-part test set forth in *Bradshaw* is satisfied here. In *Bradshaw*, the defendant asked, "Well, what is going to happen to me now?" (*Bradshaw*, 462 U.S. at 1045-46, 77 L.Ed. 2d at 412, 103 S.Ct. at 2835.) The Supreme Court found that this question *did* evince a desire for generalized discussion about the investigation. (*Bradshaw*, 462 U.S. at 1045-46, 77 L.Ed. 2d at 412, 103 S.Ct. at 2835.) The Court contrasted the defendant's question from inquiries, such as a request for a drink of water or a request to use the telephone, which are so routine that they do not represent a desire to open up a generalized discussion of the investigation. Here, the defendant's question did not relate to a routine aspect of custody. Rather, the defendant's question clearly related to the investigation and evinced a desire to discuss the investigation. The majority's finding to the contrary conflicts with the Supreme Court's decision in *Bradshaw*.

I would find that the defendant's question evinced a willingness and desire for a generalized discussion of the investigation. Because the first part of the *Bradshaw* inquiry is satisfied, the majority should have addressed the second part of the test. Specifically, the majority should have considered whether the totality of the circumstances, including the fact that the defendant reopened he dialogue with the police, indicated that the defendant waived his previously invoked right to counsel.

JUSTICE HEIPLE joins in this partial concurrence and partial dissent.

APPENDIX B

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706

April 3, 1995

Hon. Jack O'Malley
State's Attorney Cook County
Richard J. Daley Center, Room 500
Chicago, IL 60602

No. 75598 – People State of Illinois, appellant, v. Joel Olivera, appellee. Appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on April 13, 1995.

APPENDIX C

Fifth Division
April 30, 1993

No. 1-90-3054

THE PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.
Plaintiff-Appellee,	)	
v.	)	HONORABLE DANIEL J. KELLY JUDGE PRESIDING
JOEL OLIVERA,	)	
Defendant-Appellant.	)	

JUSTICE MURRAY delivered the opinion of the court:

The defendant, Joel Olivera (Olivera), and codefendant, Jorge Vargas (Vargas), were charged by indictment with the offenses of first degree murder and armed violence for their respective roles in the fatal shooting of Raphael Torres on July 29, 1988. Following a jury trial, Olivera was convicted of first degree murder and sentenced to 35 years in the Illinois Department of Corrections.

On appeal defendant presents the following issues for review: (1) Whether the defendant was proven guilty beyond a reasonable doubt; (2) Whether the trial court committed reversible error in denying defendant's motion to suppress statements; (3) Whether the trial court committed reversible error in denying second degree murder instructions; (4) Whether the trial court committed reversible error by failing to require the State to produce to the defense certain notes used by the assistant State's Attorney to refresh his recollection before testifying; (5)

Whether the prosecutor's alleged references in closing argument to Olivera's failure to testify constituted reversible error; and (6) Whether the trial court abused its discretion in sentencing the defendant to 35 years.

TRIAL

Raphael Torres was shot and killed on the evening of July 29, 1988, near the intersection of 19th Street and Wood Street in Chicago. Testimony indicated that Torres died that night of a single gunshot wound to the chest. The fact that Torres was shot and killed on July 29, 1988, was undisputed at trial.

The State called nine witnesses at trial in its case against Olivera. Alvaro Dominguez was called to testify by the State and was the only individual to testify as an eye witness to the shooting. Mr. Dominguez testified that on the evening of July 29, 1988, he and three friends were standing outside talking at a friend's house located near the intersection of 19th Street and Wood Street. As they were talking, Mr. Dominguez observed a youth (Torres) crossing the intersection of 19th and Wood alone. As Torres was crossing the intersection, a prime gray car entered the intersection slowly. He saw someone in the driver's seat of the car and someone in the back seat, behind the driver. Something was said and he heard a single shot fired. This shot came from the intersection. At trial he could not say whether the shot was fired from the back seat, however, on the evening of the incident, he reported to the police that there were at least three people in the gray car and that the shot he had heard came from the back seat of the vehicle behind the driver's seat. After he heard the shot, Mr. Dominguez saw the victim stumble out of view and the gray car

drove off; the victim was on the driver's side of the car at the time Dominguez heard the shot. He did not see anyone get out of the car, walk over to the youth, and shoot him. He did not see anyone making gang signs, nor did he see persons throwing bottles at the car.

Mr. Dominguez further testified that he did not know the victim and had never seen or known Olivera before that day of the trial. Mr. Dominguez was unable to identify the three individuals he saw in the gray car, he was only able to see their silhouettes. Mr. Dominguez was never asked by the police to view a lineup with Olivera in it, and never identified Olivera as being involved in the Torres shooting.

According to police witnesses called by the State, shortly after the shooting occurred, the crime scene was secured and the entire area was thoroughly searched and photographed by several police officers and detectives. The physical evidence found at the scene consisted of a single discharged 25 caliber cartridge case. No gun was ever recovered in connection with the Torres shooting. No broken glass was found near the intersection and no evidence of any bullets, bullet holes or bullet marks of any kind was found by the police in the buildings near where the victim was shot.

A firearms examiner testified that the bullet recovered from Torres was a 25-caliber bullet. However, he also testified that although the discharged 25-caliber shell casing found at the scene of the Torres shooting and the 25-caliber bullet recovered from Torres' chest were both 25 caliber, it was impossible to determine, without having and testing the gun that was used, whether the bullet from Torres' chest, was, in fact, fired from the shell recovered at the crime scene.

Officer Darrell Gilliam was assigned to investigate an aggravated battery which had occurred on July 31, 1988 (the Cortez shooting). The officer had been to defendant's home several times and had left his card, since defendant was a suspect for that crime. On August 9, 1988, Officer Gilliam received a phone call from an attorney who stated that he had the defendant with him and he wanted to bring him to the station. When defendant arrived at the station, the officer told him that he would be charged with an aggravated battery and advised him of his rights. Officer Gilliam prepared the paperwork associated with the arrest, contacted a youth officer due to defendant's age, and brought defendant to violent crimes Detective Chris Kato. At the conclusion of Officer Gilliam's testimony, the trial judge instructed the jury that the testimony concerning the aggravated battery was only elicited to show that defendant was in the police station and did not have any relevancy to the trial.

Detective Kato also testified on behalf of the State. On August 9, 1988, he was also assigned to investigate the aggravated battery case and had been informed by Officer Gilliam that defendant was in custody. A lineup was conducted and defendant was informed of the results. Defendant was advised of his rights and he spoke to the officers about the aggravated battery. When Detective Kato spoke to his lieutenant about the Cortez case, he was informed that it had similarities to a homicide that had occurred two days earlier. Detective Kato went back into the interview room, readvised defendant of his rights, and defendant confessed to the shooting of Raphael Torres.

At approximately 3:30 a.m. Assistant State's Attorney (ASA) Cummings met with the defendant in the presence

of Detective Kato and youth Officer Troike. ASA Cummings testified that the defendant was again advised of his rights and subsequently had a conversation with him. Defendant chose to memorialize his statement with a court reporter, so a court reporter was requested. About one hour later ASA Cummings stepped into the interview room to see if defendant needed to use the washroom or if he wanted a drink. The defendant told the ASA that he had been treated well.

The court reporter arrived and the defendant indicated he understood his rights prior to making his statement. ASA Cummings published the defendant's statement to the jury. The statement disclosed the following. ASA Cummings supplied the date, time, location and name of the victim by stating: "We're here to take the statement of Joe [sic] Olivera concerning the investigation of the shooting of Ralph Torres, which occurred on July 29, 1988, at approximately 10:40 p.m. at 1900 South Wood, Chicago, Illinois." Defendant told the ASA that he was driving around with his friend "White Boy" (Jorge Vargas) at 10:30 p.m. Defendant was sitting in the passenger seat. As they were driving, defendant saw seven members of the Bishops, a rival gang of defendant's gang, the Morgan Boys. The Bishops were making hand signals and throwing bottles at their car. Defendant was scared so he went for the gun under White Boy's seat. Defendant shot at the crowd of Bishops two to seven times and then left the scene. Defendant, ASA Cummings, Detective Kato and youth Officer Troike initialed and signed the confession. At the conclusion of defendant's statement, ASA Cummings testified that in his first conversation with the defendant, Olivera had not indicated that bottles had been thrown or that he was scared.

Although Olivera did not himself testify at trial, two witnesses, Christine Alvarado and Erma Cazares testified on his behalf. Christine Alvarado testified that on July 29, 1988, she was sitting out in front of her house. She saw defendant at the corner between 10 and 11 p.m. and did not see him leave in a car. Defendant went inside, at about 11:15 p.m., before his father came home from work. Anthony Alvarez came over to talk to her and told her that someone had been shot at 19th and Wood. Ms. Alvarado did not know how Anthony could have learned about the shooting since she did not see anyone come to talk with him and he never left the corner. On redirect, however, she stated that she saw a car stop at the corner. Although Ms. Alvarado learned that defendant had been arrested for murder, she never told the police or the State's Attorney's Office that she saw defendant on the night of the incident.

Erma Cazares, who lived in the same building as defendant, also testified that she saw defendant on July 29, 1988, talking with some guys across the street. She saw defendant talk to someone in a car, but she never saw him leave the area. Ms. Cazares was outside on the steps with her kids until about 11 p.m. Although Ms. Cazares also learned that defendant had been arrested, she did not give this information to the police or the State's Attorney's Office.

THE MOTION TO SUPPRESS

Prior to trial, a hearing was held on defendant Olivera's motion to suppress his statement. The testimony at the motion disclosed the following.

Chicago police officer Darrell Gilliam testified on behalf of the State. At approximately 6-7 p.m. on August 9,

1988, Officer Gilliam met Olivera, Olivera's father, and Olivera's attorney at the police station. Officer Gilliam had previously been trying to locate Olivera as a suspect in the Cortez case. Earlier that day he had received a call from an attorney he believed to be John DeLeon (DeLeon), who indicated he was willing to surrender his client, Olivera, to police custody. At the station Officer Gilliam informed DeLeon that he would be advising the defendant of his juvenile rights and after his processing, Olivera would be turned over to area four violent crimes detectives for the follow-up investigation. He informed DeLeon and Olivera that a lineup was to be conducted. DeLeon told him that his client would not make any statement as to this particular incident other than giving the officer the pertinent information for the arrest reports. Officer Gilliam testified that he and DeLeon had a gentleman's agreement that if Olivera was picked out of the lineup, Gilliam would contact the attorney and let him know what happened. Prior to DeLeon leaving the station, he left his business card which had his beeper number and home phone number. DeLeon did not ever tell him that he wanted to be present for any lineup.

After DeLeon left, Gilliam processed the arrest report and turned Olivera over to Detective Chris Kato. When Officer Gilliam spoke with Detective Kato, he told him that he had placed Olivera under arrest and that Olivera had surrendered himself with his attorney. Officer Gilliam testified: "I told Officer Kato that he surrendered himself with his Attorney and his Attorney had instructed his client not to give me any information as to this particular incident." After that point he had no further contact with Joel Olivera.

Officer Gilliam further testified that at approximately 10 p.m., he received a call from Detective Kato who informed him that two witnesses made positive identification of Olivera as to the aggravated battery of Raphino Cortez. At that time, Officer Gilliam contacted DeLeon and informed him Olivera had been identified and would be turned over to area four. Officer Gilliam was not aware that Olivera was a suspect in a homicide until the next day when he returned to work. He testified that neither he nor anyone in his presence ever struck the defendant or told him that he could not talk to his attorney. Officer Gilliam did not give Detective Kato either of the numbers DeLeon had left.

Detective Wayne Johnson also testified on behalf of the State. On August 9, 1988, he was a Chicago police detective assigned to area four violent crimes. On that night his partner was Detective Kato. Although he did not receive any information from Officer Gilliam that evening, his partner did. Detective Kato informed him that a gang crimes specialist was bringing up a person turned in on a shooting. He and Detective Kato conducted a lineup regarding the July 31, 1988, Cortez shooting. The defendant was identified in the lineup. Shortly thereafter, Detective Johnson had a conversation with Detective Kato. At approximately 11 p.m., he went to an interview room where Detective Kato and Olivera were also present. The defendant proceeded to give a statement regarding the Cortez aggravated battery (the subject of the lineup). The statement was approximately 10 minutes long. After this conversation, Detective Johnson spoke with his lieutenant and they learned that a car used in a previous homicide matched the description of the car used in the Cortez shooting. The detectives went back

into the interview room at approximately midnight. After Olivera was advised of his rights and informed of the reason for which he was being talked to, he gave a statement regarding the homicide (the Torres case). Johnson had no further contact with the defendant. He did not make any attempts to contact Olivera's attorney and, to his knowledge, neither did Detective Kato.

On cross-examination, Detective Johnson stated that he first spoke with Olivera at approximately, 11 p.m., after the lineup. Detective Kato informed Olivera that he was picked out in the lineup. Detective Johnson believed those were the first words spoken by anybody in that room. The following is an excerpt of defense counsel's cross-examination of Detective Johnson:

"Q. You started questioning Mr. Olivera. Is that right sir?

A. We spoke with him.

Q. Right. This was after the line-up?

A. After the line-up.

Q. About what time was that?

A. Shortly after eleven.

Q. And when you spoke with Mr. Olivera shortly after eleven it was you and Detective Kato that spoke with Mr. Olivera? Isn't that right?

A. That's correct.

Q. And what was the first thing that either you said, Detective Kato said or Mr. Olivera said?

A. I believe he was informed he was picked out as an offender in a line-up.

Q. So it was Detective Kato who informed Mr. Olivera of this. Isn't that right?

A. That's correct.

Q. Those were the first words spoken by anybody in that room?

A. I believe so.

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MR. BLOOM [Defense counsel]: After he was informed of that by Detective Kato he was picked out of a line-up that's when Detective Kato you say gave him these Miranda warnings you spoke of?

A. No.

MR. BURNS [Prosecutor]: Objection. We're confusing two different conversations here.

THE COURT: Sustained.

MR. BLOOM: All right. After the line-up when he was informed he had been picked out by two witnesses by Detective Kato what was the next thing that was said?

A. I can't tell you verbatim. We were walking out of the room and he informed Detective Kato that he wasn't alone.

Q. When you had this earlier conversation Counsel says that there was two separate conversations that perhaps we're confusing. All right?

A. Correct.

Q. The one after the line-up is the one you just spoke about?

A. That's correct.

Q. There was one before the line-up?

A. Not that I recall.

Q. Where was the conversation where he was given these Miranda warnings?

A. That was later on in the evening regarding a different incident.

Q. All right. Now later on in the evening what time was it that he was given these warnings?

A. It had to be around midnight."

Detective Johnson testified that around midnight Detective Kato told Olivera that he wanted to give him his rights. Detective Kato initiated the conversation. Following that is when certain admissions about a murder were made.

Detective Christon Kato testified on behalf of the State. On August 9, 1988, he was assigned to investigate the aggravated shooting of Raphino Cortez. He made arrangements for a lineup and one was conducted. Prior to the lineup, he had no conversations with the defendant, however, Officer Gilliam told him if a positive identification of Olivera was made, he had to notify defendant's lawyer. After Detective Kato notified Officer Gilliam with the results of the lineup, he began to remove all of the individuals except the defendant out of that room. The defendant remained in the same room where the lineup was conducted. Defendant asked Detective Kato, "what happened?" Kato replied that defendant had been positively identified. Subsequently, the defendant asked "what happens next?" After Detective Kato advised Olivera of his rights, Olivera told Detectives Kato and Johnson he was not alone when he shot the victim. The conversation lasted approximately 15 minutes. The detectives left the room and Kato then spoke with his lieutenant who informed him of a similar shooting two days prior to the aggravated battery. After he received this information, he looked at the reports on the homicide. Detective Kato reentered the interview room and advised

Olivera of his rights again. He inquired as to defendant's knowledge of the July 29 shooting of Raphael Torres. Prior to the conversation with the lieutenant, Detective Kato did not know anything about the Torres murder and to his knowledge the defendant had not been a suspect. The second conversation with the defendant took place at approximately midnight. Prior to this conversation, Detective Kato again advised the defendant of his rights and informed him that the focus of his investigation was the murder of Ralph Torres. After this 15-20 minute conversation, Detective Kato had occasion to have another conversation with the defendant at approximately 3 a.m. An ASA and youth Officer Troike were also present at this time.

John DeLeon was called to testify on behalf of the defendant. He is an attorney licensed to practice law in Illinois. DeLeon testified that on August 9, 1988, defendant's father called his office and asked for an appointment that very day. Olivera's father indicated that Officer Gilliam had stopped by his house looking for his son Joel. Prior to meeting with the Oliveras, DeLeon confirmed with Officer Gilliam that he was looking for the defendant as a suspect on an aggravated battery case. Nothing was mentioned about a murder case. After speaking with the defendant and his father in his office, DeLeon contacted Officer Gilliam, who was to wait for them at the station.

They arrived at the police station at approximately 6 p.m. and were taken to an interview room. Officer Gilliam inquired as to whether the defendant understood his *Miranda* rights and explained to Olivera that because he was 16 years old he could be charged as an adult for the aggravated battery of Raphino Cortez. At no time did

Officer Gilliam tell DeLeon about any other case or investigation regarding an incident that happened several days earlier. Olivera maintained that he did not want to answer any questions. DeLeon again told Officer Gilliam that Olivera was invoking his rights and his right not to talk. Officer Gilliam responded that he understood Olivera did not wish to answer any questions other than those relating to background information. DeLeon asked Officer Gilliam that if any questioning would go on to please contact him. Officer Gilliam responded that he'd be happy to do so if De Leon would leave him a phone number. DeLeon did not feel it was necessary at the time to remain at the police station until the witnesses were located for the lineup. Prior to leaving the police station, DeLeon left his beeper number and a card with his office number. At that time, Officer Gilliam indicated that the father could stay with the defendant. At approximately 8:30 p.m., DeLeon called the police station and asked for an update, at which time Gilliam indicated that they were still holding the defendant as a suspect on the aggravated battery, attempted murder case of Raphino Cortez and the police had been unable to locate the witnesses for the lineup. DeLeon asked to be notified because he wanted to be present for the lineup. At about 9:30 or 10 p.m., DeLeon spoke with Officer Gilliam, who indicated a lineup had been conducted (it was kind of last minute and he really didn't get a chance to call DeLeon), someone identified Olivera on the Cortez case, Olivera would be charged for aggravated battery, attempted murder in the Cortez case and that he could go to juvenile court the following day.

When asked if he had another discussion with Officer Gilliam that night, DeLeon responded:

"Yes, he also at that time asked if he could ask my client about a weapon that was used in that aggravated battery attempt murder case, about the location of the weapon. I told him that I didn't think I wanted my client to answer any questions about that, that I would come down to the station and talk to my client and see if he wanted to answer questions. But I indicated to him over the phone that I did not want my client questioned about a weapon because if he were to indicate he knew anything about a weapon or location of a weapon it would be the same thing as giving a statement.

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Officer Gilliam indicated that again he would respect the defendant's rights and he would not ask anything further about any weapon and he again told me that the Court date was on the following date in Calendar Twenty, Juvenile."

The next day was the first time DeLeon learned the police had questioned Olivera about a separate murder investigation.

The defendant's father, Gerado Olivera, testified on behalf of the defendant. On August 9, 1988, he accompanied his son to an attorney's office and then to the police station. At the police station, he heard an officer giving his son his rights. The lawyer asked Olivera if he wanted to talk about the case and Olivera told him no. Mr. Olivera testified that he speaks fluent Spanish, but he also understands a little English. He heard DeLeon tell the officer that if they wanted to ask his son anything to call him. DeLeon gave the police officer his beeper number. Mr. Olivera stayed in the room with his son just a few minutes because the officer told him they were going to take his son to a lineup, and he could not stay there. Mr. Olivera remained at the station until 5:00 a.m.

On cross-examination the court allowed the State to question Mr. Olivera in English without the aid of an interpreter. Mr. Olivera was permitted to give his response in Spanish to the interpreter; the interpreter was not to interpret the State's questions, only Mr. Olivera's responses. After the State questioned Mr. Olivera in English regarding the defendant's rights at the police station, the trial court stated he was pretty satisfied that Mr. Olivera understood English fairly well.

Both sides rested and the trial judge stated he would take several minutes to review his notes. When issuing his ruling on the motion, the trial court stated the following. First, it was clear that the defendant by or through his father contacted DeLeon before contacting the police and turning himself in, and that by his actions he invoked his right to have counsel present. While at the police station the rights were read to the defendant or given to the defendant by Officer Gilliam. Defendant stated that he did not wish to talk to the police with regards to the incident for which he had turned himself in. There was some agreement between Officer Gilliam and DeLeon that DeLeon would be notified. DeLeon testified that he requested to be present for the lineup. Officer Gilliam's testimony differed in that he testified he was only to notify DeLeon of the results of the lineup if one was finally held. A lineup was held and DeLeon was made aware that his client had been identified.

The trial court noted the critical issue was who initiated the conversation and stated:

> "I believe that what happened is as Officer Kato testified. After the lineup as the others were out of the room, Mr. Olivera asked Detective Kato what happened, and therefore initiated or began an ex-

change between the officer and the defendant. And after this a second question was asked. The defendant asked what would happen next, and then it flowed into the defendant making some statements pertaining to the aggravated battery, that he was not alone when he shot the victim in this case.

I believe it is from this, although earlier the defendant had exercised his constitutional right to remain silent and had set forth that he did not wish to speak to the police; the defendant, it is clear from the case law, both *Edwards* and *Roberson*, that the defendant after invoking his rights, and in fact, later waived them. And one of the ways that this can be done is by initiating a conversation with the police as what happened here.

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So I am going to—and the question that continued on from there as to the murder investigation of July 29th was also proper as a continuing investigation although new rights were—the rights were again given to the defendant prior to this questioning. I find that it was a continuous conversation between the defendant and the police as to the activity that the defendant was involved in over a couple of day [sic] period of time."

The trial court denied the motion to suppress.

OPINION

Olivera argues that this is not an appeal involving a conspicuously guilty defendant who is attempting to exploit some legal technicality in order to argue that he was deprived a fair trial for one reason or another. Olivera maintains he is innocent of the July 29, 1988, fatal shooting of Raphael Torres. He does however, concede

that he is guilty of a different crime: the July 31, 1988, aggravated battery attempted shooting of Raphino Cortez. Olivera argues to this court that in making certain incriminating oral and court-reported statements to the authorities following his arrest for aggravated battery, he believed he was confessing to the Cortez shooting (which he did commit and for which he had surrendered himself to the authorities) when he answered the authorities questions regarding the Torres shooting.

Olivera argues that the statements he made concerning his involvement in the Torres murder should not have been admitted into evidence. Defendant presents three arguments to support this allegation: First, he claims that the court erred in its determination that he waived his right to counsel; second, that defendant's statements were made after his sixth amendment right to counsel had attached; and third, that the ASA should not have spoken with the defendant outside the presence of his attorney. Conversely, the State maintains that defendant's argument fails on all three propositions: First, the evidence presented proved that although defendant had an attorney when he came into the station, he knowingly waived his right to counsel when he initiated a conversation with the police after his lineup; second, defendant's sixth amendment right to counsel had not yet attached since defendant had not been formally charged in this matter; and third, since defendant waived his right to counsel, the ASA did not violate any ethical rules when he advised defendant of his rights and spoke with him about the crime. Therefore, the State maintains that the testimony presented at defendant's hearing on his motion to suppress fully supported the trial court's finding that defendant waived his right to counsel and voluntarily confessed to the shooting of Raphael Torres.

For the following reasons we find that the trial court erred in denying the defendant's motion to suppress statements. In light of that decision we feel we must reverse the defendant's conviction, for without the admission of Olivera's statement at trial, we believe the case against him fails miserably. As a result of this determination we need not address the remaining issues raised by the defendant.

After initially being advised of his *Miranda* rights, the accused may himself validly waive his rights and respond to interrogation. (*North Carolina v. Butler* (1979), 441 U.S. 369, 372-76, 60 L.Ed.2d 286, 99 S.Ct. 1755.) Statements made by a suspect who earlier expressed a desire to remain silent are admissible if the police "scrupulously honored" the defendant's right to cut off questioning. (*Michigan v. Mosley* (1975), 423 U.S. 96, 104, 46 L.Ed.2d 313, 321, 96 S.Ct. 321, 326.) Webster's Dictionary defines "scrupulously" as "conscientiously, painstakingly." (Webster's Third New International Dictionary (1981), p. 2043.) The United States Supreme Court, having provided that interrogation must cease if an individual invokes his *Miranda* rights, has also addressed the conditions under which an interrogation may be resumed. The Supreme Court has held, with regard to the right to counsel under the fifth and fourteenth amendments, that when an accused has invoked the right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation, even if he has been advised of his rights. (*Edwards v. Arizona* (1981), 451 U.S. 477, 484, 68 L.Ed.2d 378, 386, 101 S.Ct. 1880, 1884-85.) In addition, the Court held "an accused *** having expressed his desire to deal with

the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." (*Edwards*, 451 U.S. at 484-85, 68 L.Ed.2d at 386, 101 S.Ct. at 1884-85; see also *People v. Humphries* (1991), 223 Ill. App. 3d 81, 89, 584 N.E.2d 996.) In determining whether the accused waived his right to counsel the question becomes "whether the purported waiver was knowing and intelligent and found to be so under the totality of the circumstances, including the necessary fact that the accused, not the police, reopened the dialogue with the authorities." *Edwards*, 451 U.S. at 486 n.9, 68 L.Ed.2d at 387 n.9, 101 S.Ct. at 1885 n.9.

In *Oregon v. Bradshaw* (1983), 462 U.S. 1039, 1044, 77 L.Ed.2d 405, 103 S.Ct. 2830, the United States Supreme Court stated that "even if a conversation taking place after the accused has 'expressed his desire to deal with police only through counsel' is initiated by the accused, where reinterrogation follows, the burden remains upon the prosecution to show that subsequent events indicated a waiver of the Fifth Amendment right to have counsel present during interrogation." (See also *Edwards*, 451 U.S. at 486 n.9, 68 L.Ed.2d at 387 n.9, 101 S.Ct. at 1885 n.9.) The preliminary inquiry is whether the defendant initiated the conversation in a manner evincing a "willingness and a desire for a generalized discussion about the investigation." (*Bradshaw*, 462 U.S. at 1045-46, 77 L.Ed.2d at 412, 103 S.Ct. at 2835.) This is to be contrasted with inquiries into the routine aspects of custody, such as asking for a drink of water or to make a telephone call. (*Bradshaw*, 462 U.S. at 1045-46, 77 L.Ed.2d

at 412, 103 S.Ct. at 2835.) In *Bradshaw*, the defendant asked, "Well, what is going to happen to me now?" (*Bradshaw*, 462 U.S. at 1045-46, 77 L.Ed.2d at 412, 103 S.Ct. at 2835.) The Supreme Court found that, although somewhat ambiguous, this question indicated a desire for a generalized discussion about the investigation; it was not merely a necessary inquiry arising out of the incidents of the custodial relationship.[1]

After determining that there was not a violation of the *Edwards* rule, the Supreme Court stated that the next inquiry was "whether a valid waiver of the right to counsel and the right to silence has occurred, that is, whether the purported waiver was knowing and intelligent and found to be so under the totality of the circumstances, including the necessary fact that the accused, not the police, reopened the dialogue with the authorities." (*Bradshaw*, 462 U.S. at 1046, 77 L.Ed.2d 405, 103 S.Ct. 2835, quoting *Edwards*, 451 U.S. at 486 n.9, 68 L.Ed.2d at 387 n.9, 101 S.Ct. at 1885 n.9.) This determination

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[1] After the defendant inquired, "Well, what is going to happen to me now?" The police officer answered: "You don't have to talk to me. You have requested an attorney and I don't want you talking to me unless you so desire because anything you say—because—since you requested an attorney, you know, it has to be at your own free will." The defendant stated he understood and there followed a discussion between the defendant and the police officer. (*Bradshaw*, 462 U.S. at 1042, 77 L.Ed.2d at 405, 103 S.Ct. at 2833.) The Supreme Court held that the above statement could have reasonably been interpreted by the officer as relating generally to the investigation and that the police officer so understood is apparent from the fact that he immediately reminded the accused that "[you] do not have to talk to me," and it was only after the accused told him that he "understood" that they had a generalized discussion. *Bradshaw*, 462 U.S. at 1045-46, 77 L.Ed.2d at 405, 103 S.Ct. at 2835.

depends upon " 'the particular facts and circumstances surrounding [the] case, including the background, experience, and conduct of the accused.' " *North Carolina v. Butler*, (1979), 441 U.S. 369, 374-75, 60 L.Ed.2d 286, 99 S.Ct. 1755, quoting *Johnson v. Zerbst* (1938), 304 U.S. 458, 464, 82 L.Ed.2d 1461, 58 S.Ct. 1019.

In *Arizona v. Roberson* (1988), 486 U.S. 675, 100 L.Ed.2d 704, 108 S.Ct. 2093, the Supreme Court emphasized the virtues of a bright line rule to assist law enforcement personnel and courts in applying the *Miranda* requirements and noted that when an accused asserts his right to counsel, he has indicated that he considers himself unable to deal with the pressures of custodial investigation without legal assistance. Thus, the court held that a suspect's request for counsel should be applied to any questions the police may pose, not only those relating to a specific investigation. *Roberson*, while adopting the bright line rule of *Edwards* that all interrogation must cease when a suspect requests an attorney, also acknowledged the holding of *Edwards* that the accused may waive his right to counsel by himself initiating further communications, exchanges or conversations with the police. *Roberson*, 486 U.S. 682-83, 100 L.Ed.2d at 714, 108 S.Ct. at 2098.

In *Roberson*, the defendant was arrested for burglary. A police officer advised the defendant of his *Miranda* rights. In response, the defendant informed the police officer that he wanted to speak to an attorney before he answered any questions. Although the arresting officer noted this fact in his written report of the incident, the defendant was not given an opportunity to consult with an attorney. Three days after the initial interrogation, and while the defendant was still in custody, another

police officer advised the defendant of his *Miranda* rights and questioned him about an unrelated burglary. The second police officer was unaware that the defendant had requested an opportunity to speak with counsel when he was questioned about the first burglary charge. During this second interrogation, the defendant made an incriminating statement about the second burglary which he later sought to have suppressed. The Supreme Court determined that the defendant's incriminating statements were obtained in violation of his fifth amendment right to counsel. The Court held that the rule enunciated in *Edwards* precluded the authorities from interrogating an accused following the accused request for counsel in the context of a separate investigation. (*Roberson*, 486 U.S. at 682, 100 L.Ed.2d at 714, 108 S.Ct. at 2098.) The Court specifically noted that "the presumption raised by a suspect's request for counsel—that he considers himself unable to deal with the pressures of custodial interrogation without legal assistance—does not disappear simply because the police have approached the suspect, still in custody, still without counsel, about a separate investigation." *Roberson*, 486 U.S. at 683, 100 L.Ed.2d at 715, 108 S.Ct. at 2099.

In *People v. Hicks* (1989), 132 Ill. 2d 488, 548 N.E.2d 1042 the Illinois Supreme Court reiterated the two-step inquiry set forth in *Bradshaw*: (1) whether defendant initiated the conversation in a manner evincing a "willingness and a desire for a generalized discussion about the investigation" (*Bradshaw*, 462 U.S. at 1045-46, 77 L.Ed.2d at 412, 103 S.Ct. at 2835); (2) whether, by defendant's initiation of a conversation, coupled with the totality of the other circumstances, he knowingly and intelligently waived his right to counsel's presence during questioning. The court then addressed whether when the

defendant waived his right to counsel by initiating the conversation with the police regarding his involvement in the crime with which he was charged, the police were thereby authorized to interrogate the defendant concerning other crimes.[2] The court held:

> "The fact that the topic of conversation shifted to another crime after defendant's waiver of his rights does not render his confession involuntary. The proper inquiry focuses on the custodial atmosphere, not the specific line of questioning." *Hicks*, 132 Ill. 2d at 496, 548 N.E.2d 1042.

The State maintains that the defendant's question to Detective Kato, "what happened" initiated a conversation concerning the investigation. The State argues that this question is strikingly similar to the respective questions posed by the defendant in *Oregon v. Bradshaw* (1983), 462 U.S. at 1045-46, 77 L.Ed.2d at 412, 103 S.Ct. at 2835 and in *People v. Bell* (1991), 217 Ill. App. 3d 985, 996-97, 577 N.E.2d 1228.

We find that although the questions in *Bradshaw* and *Bell* are somewhat similar to the present case, the totality of the circumstances is quite different. As discussed earlier, the court in *Bradshaw* found that although the

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[2] In *Hicks*, the Illinois Supreme Court determined that the defendant knowingly and intelligently waived his fifth amendment right to counsel. However, prior to reaching this result the court noted Hicks gratuitously offered exculpatory statements, such statements having been made after the police officer again admonished him not to speak in the absence of his attorney, that the police officer had advised defendant of his *Miranda* rights on several occasions in both oral and written form, and finally, that the defendant was sufficiently familiar with the criminal justice system to realize that "he had the right to keep quiet until his attorney was present." *Hicks*, 132 Ill. 2d at 493, 548 N.E.2d at 1044.

defendant's statement was ambiguous, the totality of the circumstances indicated that the defendant evinced a willingness to discuss the case. In the present case, Olivera's statement was more vague than the question in *Bradshaw*, there was nothing to indicate that the Olivera understood his rights as in *Bradshaw*, Olivera was 16 years old with no prior experience with the police and he surrendered himself to the police in the company of his father and his lawyer.

In *People v. Bell* (1991), 217 Ill. App. 3d 985, 997, 577 N.E.2d 1228 the testimony indicated that the defendant had asked, "[W]hat are the charges against me?" and the court held that the defendant's question clearly related to the investigation and therefore should suffice to constitute "initiation" of communications by the defendant. The court noted that defendant was advised of his rights several times; both in written form and orally, twice after he indicated he wanted to tell his story. Bell also had several prior convictions, thus it is obvious that he had some prior experience which the criminal justice system. We believe that Olivera's statement was more vague than the defendant's statement in *Bell* and that the totality of the circumstances make the present case distinguishable.

The State acknowledges that it is the State's burden to prove that defendant waived his rights per *Miranda*, however, proof of the waiver beyond a reasonable doubt is not required. (*People v. Rogers* (1988), 123 Ill. 2d 487, 495, 528 N.E.2d 667.) The test of voluntariness is whether the statement was made freely, voluntarily and without compulsion or inducement of any sort, or whether the defendant's will was overcome at the time he confessed. (*People v. Prim* (1972), 53 Ill. 2d 62, 70, 289 N.E.2d 601.) The trial court's role is to resolve all issues of credibility

and the trial court's ruling on a motion to suppress will not be disturbed unless the finding is contrary to the manifest weight of the evidence. *People v. Clark* (1986), 114 Ill. 2d 450, 457, 501 N.E.2d 123.

The State argues that in the present case the trial judge noted the difference in testimony presented by Detectives Kato and Johnson and then resolved the issue in favor of the State and found that defendant initiated a conversation with Detective Kato and therefore waived his right to counsel. The State maintains that the trial court's ruling acknowledged the differences between the testimony of the detectives and he determined that Detective Kato's version was more credible. However, the trial judge here did not indicate if he was determining whether the police "scrupulously" honored defendant's previous exercise of his right to remain silent. In fact the trial judge merely stated: "It is clear from case law that the defendant after invoking his right and in fact later waived them. And one of the ways this can be done is by inviting a conversation with the police as what happened here." However, the fact that a defendant was the one who initiated a conversation, is an act that is necessary but not sufficient to determine whether subsequent events indicate a waiver of defendant's previously invoked rights. *People v. Bell* (1991), 217 Ill. App. 3d 985, 997, 577 N.E.2d 1228.

The State maintains that the testimony presented at the hearing and at trial fully supports the trial court's ruling that defendant knowingly and intelligently waived his right to counsel. Voluntariness is determined by consideration of the totality of the circumstances. Factors to be considered in determining admissibility of a statement made after an initial refusal to make one are whether there was a significant period of time between the defen-

dant's exercise of his right to remain silent and the requestion; whether the requestioning was preceded by *Miranda* warnings; and whether a different officer conducted the second questioning. *People v. Reyes*, 181 Ill. App. 3d 246, 255, 536 N.E.2d 990.

The trial court found, and we agree, that Olivera initially invoked his right to remain silent and his right to counsel. Therefore, we must look to whether defendant waived these rights by subsequently initiating communication with the authorities, evincing a desire to have a generalized discussion about the investigation and if by initiating a conversation, coupled with the totality of the other circumstances, he knowingly and intelligently waived his right to remain silent and to counsel's presence during questioning.

On August 9, 1988, Olivera was arrested for the July 31, 1988, aggravated battery of Raphino Cortez when he voluntarily surrendered himself at the police station. Olivera was accompanied by his Spanish speaking father, Gerado Olivera, and his attorney, John DeLeon. Olivera was a 16-year-old high school freshman and had no prior criminal history or experience with the police. Detective Kato testified that at the conclusion of the lineup in the Cortez case, the police removed all the other individuals except Olivera from the room and then the defendant asked, "What happened." After being told he had been identified in a lineup, defendant asked "What happens next?" The testimony of DeLeon and Officer Gilliam differs as to whether DeLeon was to be called before or after the lineup. However, DeLeon further testified that when he spoke with Officer Gilliam after the lineup, he indicated that he did not want his client questioned and if the police wanted to do so, he would come down to the station to be present.

We find that given the circumstances surrounding the defendant's statement, "what happened," the defendant did not initiate a conversation evincing a desire to have a generalized discussion of the investigation. Moreover, even if it could be found that the defendant initiated such a conversation, we find that considering the totality of the circumstances, Olivera did not knowingly and intelligently waive his right to counsel's presence during questioning.

Finally, Olivera also claims that ASA Cummings violated our nebulous rules of professional ethics when he interviewed defendant without his counsel present. Although we believe common civility would dictate that the ASA would call a defendant's lawyer when he knows that the defendant has retained counsel, nothing in the rules prohibit an ASA from questioning a defendant he believes has intelligently waived his right to counsel.

We find that the trial court's decision to deny the defendant's motion to suppress oral and court reported statements was against the manifest weight of the evidence in this case. Therefore we reserve the decision of the trial court on the motion to suppress statements. However, since the State did not present any physical evidence to link Olivera to the crime and there were no witnesses who could identify Olivera, we find that without Olivera's statements the State did not present any evidence to link Olivera to the fatal shooting or Raphael Torres.

Accordingly, we reverse the defendant's conviction.

REVERSED.

GORDON, P.J., and McNULTY, J., concur.